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JAN 31 1974

IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-1174

STATE OF NORTH CAROLINA,
Petitioner,

-vs-

JOHN PAUL WREN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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INDEX

TABLE OF CASES i

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 6

CERTIFICATE OF SERVICE 8

APPENDIX A i

APPENDIX B iii

APPENDIX C xvi

APPENDIX D xix

TABLE OF CASES

Hester v. United States,
265 U.S. 57, 68 L.ed. 898,
44 S.Ct. 445 (1923) 6

Jones v. United States,
362 U.S. 257, 4 L.ed. 2d 697,
80 S.Ct. 725 (1960) 5

Katz v. United States,
389 U.S. 347, 19 L.ed. 2d 576,
89 S.Ct. 507 (1961) 6

Rugendorf v. United States,
376 U.S. 528, 11 L.ed. 2d 887,
84 S.Ct. 825 (1964) 5

Sgro v. United States,
287 U.S. 206, 77 L.ed. 260,
53 S.Ct. 138 (1932) 5

Silverthorne Lumber Co. v. United States,
251 U.S. 385, 64 L.ed. 319,
40 S.Ct. 182 (1920) 6

United States v. Harris,
403 U.S. 573, 29 L.ed. 2d 723,
91 S.Ct. 2075 (1972) 5

Wong Sun v. United States,
371 U.S. 471, 9 L.ed. 2d 441,
83 S.Ct. 407 (1963) 6

IN THE

SUPREME COURT OF THE UNITED STATES

No.

STATE OF NORTH CAROLINA,
Petitioner,

-vs-

JOHN PAUL WRENN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, the State of North Carolina, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *John Paul Wrenn v. State of North Carolina*, No. 72-2176 filed November 5, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit decided November 5, 1973, is not yet reported and is printed as Appendix A to this petition.

JURISDICTION

The jurisdiction of this Court is involved under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

DOES A SWORN STATEMENT IN AN AFFIDAVIT FOR A SEARCH WARRANT REGARDING A DATE WHICH IS ERRONEOUS BY ONE DAY REQUIRE THAT THE EVENTS OUTLINED AS OCCURRING ON THAT DAY BE STRICKEN FROM THE AFFIDAVIT IN REVIEWING IT TO DETERMINE IF IT SHOWS PROBABLE CAUSE?

II

DOES MARIJUANA GROWING IN A BACKYARD AND PLAINLY VISIBLE FROM A PUBLIC STREET COME WITHIN THE "PLAIN VIEW" EXCEPTION PERMITTING CERTAIN WARRANTLESS SEARCH AND SEIZURES?

STATEMENT OF THE CASE

On July 12, 1968, SBI Agent Haywood Starling had a marijuana plant delivered to him by a fellow law enforcement officer. How this marijuana plant was obtained by the other officer is unknown. The two men then went to the place it had been growing, John Wrenn's unfenced backyard, and from the street observed about 20 marijuana plants growing some 40-60 feet behind the house and some 20-30 feet from the sidewalk on the edge of a vegetable garden, and at the edge of the back door of the duplex apartment on the lot. Some of the plants were 4 feet high. Starling also had an additional informant who had seen the plants from the street.

Starling then had the recovered plant chemically tested to confirm it was marijuana, and on July 15, 1968, obtained a search warrant on the basis of an affidavit, which to show probable cause, said:

> "The Affiant is a Special Agent of the N. C. State Bureau Investigation which agency is charged with the investigation and enforcement of the narcotic laws. Further, that the Affiant has received information from a person known to the Affiant as truthful and reliable that John Paul Wren (sic) has had illegally held marihuana in his possession on two occasions during the period between July 1st 1968 and July 14, 1968. That the Affiant made subsequent investigation which revealed the following:
>
> "That said John Paul Wren (sic) presently resides with one Dorothy Wren at and in a single unit of a duplex white asbestos apartment located at the corner of 2nd and maple (sic) Streets, Knightsdale, N.C. and is further described as located on the west side and known as apartment "B", that John Paul Wren (sic) and Dorothy Wren (sic) live together as man and wife.
>
> "That on July 12, 1968 the Affiant examined the yard area located immediately behind the above described apartment and there found a quanity (sic) of growing suspected marihuana plants. That portions of one of the suspected marihuana plants were recovered, delivered to W S Best Chemist of the State Bureau Investigation Chemical Laboratory in Raleigh, NC that subsequently said Chemist Best advised the Affiant that the suspected marihuana was and is marihuana. That the Affiant has personal knowledge of said W S. Best having previously qualified and testified as an expert in the identification of marihuana in the courts of North Carolina."

Starling served the warrant, searched Wrenn's home, and seized both the marijuana growing outside and marijuana inside, and also elicited incriminating statements from Wrenn.

At a trial *voir dire* in February 1971 on a motion to suppress, Starling testified that the events in the first paragraph occurred "on or about the 13th of July". Later however when the date discrepancy was noted, he said "Well I would say then my testimony a moment ago was incorrect as to the date. It has been two and one-half years ago". The motion to suppress was overruled, trial proceeded, a conviction was obtained, and appeals were unsuccessful, 12 N.C. App. 146, cert. den. 279 N.C. 620 (1971), 405 U.S. 1064 (1972).

When petitioner's conviction was reviewed on habeas corpus however, the U.S. District Court held that the statement in the affidavit "That on July 12, 1968 the affiant examined the yard area located immediately behind the above described apartment and there found a quantity of growing suspected marijuana plants." was untrue because of Starling's "own admission on *voir dire*" set out above. It then found the remaining statements in the affidavit insufficient, held the warrant bad for lack of probable cause, and issued the writ.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW AFFIRMS A DECISION OF THE DISTRICT COURT WHICH FAILS TO FOLLOW THE DECISIONS OF THIS HONORABLE COURT.

A

In this case, the District Court struck an entire series of events because it found a one-day discrepancy between the date of the events as set out in the affidavit for a search warrant and as set out initially in *voir dire* testimony. While the factual basis for this finding is wholly lacking, even if there were a one-day discrepancy this would not justify either the striking of the whole date or the whole series of events, as opposed to the erroneous part of the date, and would not therefore destroy probably cause. Therefore the District Court's action was clearly erroneous, both factually and legally.

From the *voir dire* it is obvious that Starling affirmed that July 12, 1968, was the correct date rather than stating it was an

erroneous date. However, whether the events described occurred on July 12, 1968, or July 13, 1968, is unimportant. Inaccuracies on peripheral matters do not destroy probable cause, *Rugendorf v. United States,* 376 U.S. 528, 11 L.ed. 2d 887, 84 S.Ct. 825 (1964); and either of the above dates are sufficiently close to July 15, 1968, the date the affidavit was made, to meet the requirement that the events recited were "so closely related to the time of the issuance of the warrant, as to justify a finding of probable cause at the time." *Sgro v. United States,* 287 U.S. 206, 77 L.ed. 260, 53 S.Ct. 138 (1932), *United States v. Harris,* 403 U.S. 573, 29 L.ed. 2d 723, 91 S.Ct. 2075 (1972) fn 2.

Additionally, even if the above agreement is incorrect, striking all events stated to have occurred on July 12, 1968, rather than the date alone, was error since it by no means follows that because events did not occur on one day that they never occurred at all; and it is obvious that the events at issue certainly occurred on either July 12 or 13 in this case. The District Court should have stricken only the stated date if incorrect; or should have treated the affidavit as having stated the date correctly. Had this been done, the affidavit would aver a) that its maker was an agent of the drug law enforcement bureau of the state; b) that either on July 13, 1968, or in July 1968, he viewed petitioner's yard and saw what he suspected were growing marijuana plants; d) that a known reliable and truthful informer had told him that twice during July petitioner had held marijuana; d) that a fellow officer, at a time unknown, had recovered materials from the plants above which were tested and found to be marijuana. These averments, as well as those actually stated in the affidavit, show probable cause, *i.e.*, facts and circumstances are recited warranting a man of reasonable caution to believe items connected with criminal activity were likely to be found at the place to be searched at the time the search is authorized. Nothing more is required, *Jones v. United States,* 362 U.S. 257 4 L.ed. 2d 697, 80 S.Ct. 725 (1960).

B

In addition, the District Court holds by silence that a search warrant was necessary to recover the marijuana growing in the yard and plainly visible, although it is probable that it was necessary to walk into Wrenn's unfenced yard to get the marijuana initially. The

record shows that the marijuana was plainly visible from one street, perhaps two streets. There were some twenty plants. The marijuana was 4 feet high in part and on the edge of a garden in the backyard, 20-30 feet from a sidewalk. The yard was unfenced and not posted. Small plants were growing beside the back porch and door. Under these circumstances, there was no reasonable expectation of privacy as required for 4th Amendment protection; for "(w)hat a person knowingly exposes to the public even in his own home or office is not a subject of Fourth Amendment protection," *Katz v. United States*, 389 U.S. 347 at 351. As stated in the concurrence to that decision at 361, 4th Amendment protection depends on two things "first . . . a person (must) have exhibited an actual (subjective) expectation of privacy, and second that the expectation be one that society is prepared to recognize as reasonable." Obviously, in view of the physical visibility of the marijuana, the second of these is unmet. *Hester v. United States*, 265 U.S. 57, 68 L.ed. 898, 44 S.Ct. 445 (1923). The absence of this factor, plus the factor that a second informer, an "independent source", *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L.ed. 319, 40 S.Ct. 182 (1920), *Wong Sun v. United States*, 371 U.S. 471, 9 L.ed. 2d 441, 83 S.Ct. 407 (1963), had observed the plants from the street, precluded the initial discovery during, or by virtue of, a possible civil trespass from rendering the subsequent warrant void; and permitted the initial warrantless seizure of the marijuana.

CONCLUSION

The United States Court of Appeals for the Fourth Circuit has by its decision affirmed a decision which fails to follow the decisions of this Court and therefore certiorari should issue to resolve the matters concerned.

This the _____ day of January, 1974.

ROBERT MORGAN
Attorney General

RICHARD N. LEAGUE
Assistant Attorney General

Counsel for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Writ by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to Mr. Roger W. Smith, Attorney at Law, Tharrington, Thomas, Smith and Hargrove, Branch Bank Building, Raleigh, North Carolina, 27602, on the ____ day of January, 1974.

Richard N. League
Assistant Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-2176

John Paul Wrenn,

Appellee,

v.

State of North Carolina,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.
F. T. Dupree, Jr., District Judge.

(Argued June 5, 1973 Decided November 5, 1973)

Before Bryan, Senior Circuit Judge, and Field and Widener, Circuit Judges.

Richard N. League, Assistant Attorney General of North Carolina, (Robert Morgan, Attorney General of North Carolina, on brief) for Appellant; Roger W. Smith (Tharrington, Smith and Hargrove on brief) for Appellee.

PER CURIAM:

On his petition for habeas corpus, the warrant for the search of appellee John Paul Wrenn's duplex apartment in Knightdale, North Carolina, was held for naught by the District Court, and the marijuana seized under it was declared to have been improperly admitted as evidence in the State prosecution of him for its possession. Additionally, the Court set aside his conviction and remanded the case for retrial within a reasonable time, in default of which Wrenn was to be discharged from custody. This order is now appealed by North Carolina. We affirm.

When the case came on for trial in the criminal court, the defendant moved to suppress the warrant evidence. Testimony of the affiant, upon whose oath the warrant had been issued, was heard at length. The motion was denied and the ruling approved in subsequent appellate proceedings.

By agreement of the parties, the petition for habeas corpus in the District Court was heard on the evidence taken in the State court upon the motion to suppress. The Court held that in light of the affiant's testimony in the State court, probable cause had not been established by the search warrant affidavit. The District Judge made complete and explicit fact findings on a scrupulous review of the evidence. As they fully sustained his decision and we are unable to say that they are clearly erroneous, the judgment thereon must stand.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JOHN PAUL WRENN,	)	
	)	
Petitioner	)	CIVIL NO. 3040
	)	
VS.	)	
	)	MEMORANDUM OF DECISION
STATE OF NORTH CAROLINA,	)	AND
	)	ORDER
Respondent	)	

The petitioner, John Paul Wrenn, filed in this court an application for writ of habeas corpus following affirmance of his state court conviction on a narcotics possession charge, *State v. Wrenn*, 12 N.C. App. 146, 182 S.E. 2d 600 (1971), the dismissal of defendant's appeal to the Supreme Court of North Carolina "for lack of substantial constitutional question", 279 N.C. 620, 184 S.E. 2d 113 (1971), and the denial of defendant's petition to the United States Supreme Court for certiorari, _____ U.S. _____ (1972). Upon the posting of a $3,000 appearance bond this court ordered a stay of the execution of the state court judgment pending hearing on defendant's application. The case has been heard on the transcript of the evidence introduced at defendant's trial in the Superior Court of Wake County, North Carolina, the record on appeal filed by defendant in the Court of Appeals of North Carolina and a certified copy of the affidavit and search warrant, the fruits of which resulted in defendant's conviction. Counsel stipulated that the case might be heard and determined on this evidence and each party waived the introduction of further evidence concerning the issuance and validity of the search warrant, the principal issue for determination by this court. Discerning a constitutional defect in the warrant and the proceedings incident to its issuance not heretofore presented

1. (See next page.)

to any court for consideration and indeed urged here only with obliquity, this court is constrained, albeit reluctantly, to allow the writ.

---

1. As grounds on which petitioner bases his allegation that his conviction was in violation of his constitutional rights he alleges:

> "(a) illegal search and seizure
> (b) illegal confession
> (c) denial of speedy trial."

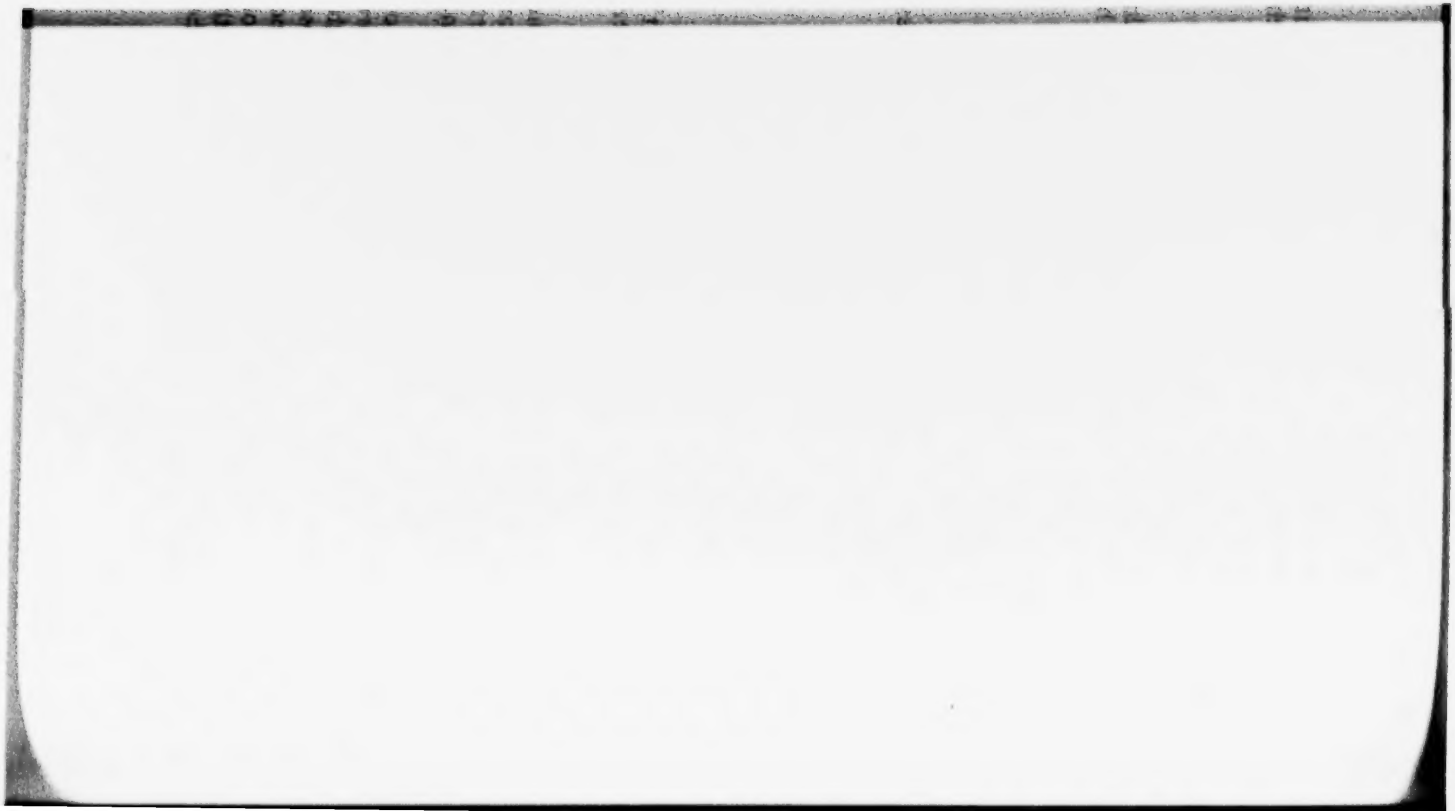
Stated as facts supporting these grounds petitioner alleges:

> "(a) probable cause established through use illegally obtained evidence
> (b) confession obtained pursuant to illegal search
> (c) indictment: July 29, 1968; trial and judgment: February 12, 1971."

The parties agree that if the search was illegal, the defendant's confession was inadmissible and vice versa, and this renders unnecessary further consideration of this ground.

Petitioner does not seriously press the speedy trial claim, and in the absence of any evidence that he ever demanded an earlier trial or that he was prejudiced by the delay, this court, as did the state court, rejects this ground of his petition.

On July 15, 1968, Haywood R. Starling, a special agent of the North Carolina State Bureau of Investigation, appeared before Brooks W. Poole, a Justice of the Peace in the City of Raleigh, and made an affidavit to obtain a search warrant for the purpose of searching the person, an (sic) apartment, the yard directly behind it and two automobiles of John Paul Wrenn in the Town of Knightdale, North Carolina. In addition to describing with particularity the premises and motor vehicles to be searched the affidavit in pertinent part read as follows:



"HAYWOOD R. STARLING, Special Agent North Carolina State Bureau Investigation, being duly sworn and examined under oath, says under oath that he has reliable information and reasonable cause to believe that JOHN PAUL WREN (sic) has on his premises narcotic drugs, to wit: MARIHUANA, in violation of the North Carolina law.

"(T)he Affiant has received information from a person known to the Affiant as truthful and reliable that John Paul Wren has had illegally held marihuana in his possession on two occasions during the period between July 1st, 1968 and July 14, 1968. That the Affiant made subsequent investigation which revealed the following:

* * * * *

"That on July 12, 1968 the Affiant examined the yard area located immediately behind the above described apartment and there found a quanity (sic) of growing suspected marihuana plants. That portions of one of the suspected marihuana plants were recovered, delivered to W. S. Best Chemist of the State Bureau Investigation Chemical Laboratory in Raleigh, N.C.; that subsequently said Chemist Best advised the Affiant that the suspected marihuana was and is marihuana. That the Affiant has personal knowledge of said W. S. Best having previously qualified and testified as an expert in the identification of marihuana in the courts of North Carolina."[2]

The search of petitioner's premises pursuant to the search warrant resulted in the discovery and seizure of marihuana in his apartment and growing in his garden in the yard behind the apartment. Following petitioner's motion to suppress this evidence at his trial the jury was excused and in accordance with approved North Carolina procedure, *State v. Myers*, 266 N.C. 581, 146 S.E. 2d 674 (1966), a lengthy voir dire examination of the witness, Haywood R. Starling, was conducted during the course of which

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2. Copies of the affidavit and warrant are attached as an appendix to this memorandum of decision.

he testified that he made the affidavit on the basis of which the search warrant was issued; that he specified the grounds set forth therein for the purpose of establishing probable cause to obtain the warrant; and he identified the affidavit and read it into evidence. He stated that he was familiar with the appearance of the marihuana plant and had dealt with it in the growing form for more than a hundred times; that he had had the petitioner's yard under observation on two occasions prior to July 15, 1968, and had observed marihuana growing in the back yard on both occasions without making an entry upon the land. He said that he obtained the specimen of marihuana about the 13th of July which he had examined by the chemist and that this was after he had talked to his informant.

The witness Starling then went on to explain that it was his informant and not he who had obtained the specimen of marihuana and that he had not personally observed any marihuana growing in petitioner's yard before the specimen was delivered to him by the informant. He testified that he informed the magistrate of these circumstances.

The witness was then cross-examined extensively concerning the location of the petitioner's apartment and its surroundings during the course of which it was developed that he lived in one side of a duplex apartment located at the corner of two streets in Knightdale and that the witness had not been to these premises prior to July 13, 1968; that he did not go on the premises on that day but that he "got out and walked around" with his informant who was with him at the time; that he went back the following day, which would have been July 14, 1968; but that the sample of growing marihuana was not obtained on either of these two days nor was he present nor did he know the date on which it was obtained by his informant. The witness said that he had not anticipated that the informant would obtain the marihuana and was not instructed by him to do so. "Had no information or evidence that it was growing there. No discussion about it until it was brought to me."

The witness then went on to say that he actually had two informants in the matter and that both gave him information on the subject. He then admitted that his testimony that he had first gone to the premises and observed the marihuana on July 12, 1968 was in error, and, of course, it follows that the statement in the

affidavit of the witness for the search warrant that he examined the yard area behind petitioner's apartment on July 12, 1968 and found there a quantity of "growing suspected marihuana plants" was likewise in error. This revelation rendered the next sentence in the affidavit, "That portions of one of the suspected marihuana plants were recovered . . . ", obviously misleading. Queried as to why he had not stated in the affidavit that his informer had in fact furnished this information the witness replied: "I don't know. Only put so much in the search warrant. I thought that I had such amount in there to sustain the search warrant.", and "Well, I did not feel that it was necessary".

At this point in the cross-examination counsel for petitioner (not the same attorney who has since represented petitioner in connection with his appeals and in this proceeding) questioned the witness Starling at some length concerning the physical layout of petitioner's premises and the distance from which the witness had observed the growing marihuana on the occasion of his first visit to the premises, and thereafter on redirect examination he stated that he had observed the plants from the street and that some of them were about four feet tall; that they were in a garden with other plants which had been cultivated; and that he had informed the magistrate of the fact that there were two informants involved in this investigation, one of whom was a police officer.

In response to a question as to what he had informed the magistrate concerning his conversation with the police officer informant the witness testified:

> "I told the magistrate that the police officer had told me that the marihuana was growing there and that he had seen it there and that he had been told by another person that they had seen it there and I further told the magistrate that the police officer delivered some of the suspected marihuana to me and that I had had it examined in our chemical laboratory and that it had been identified as marihuana and that I had also talked with the other informants and that the other informant had told me that they had seen the defendant with marihuana on his possession or with the leaves and the plant on his possession on two occasions at his residence. I informed the magistrate

that I had observed marihuana growing there in the back yard of the apartment."

Cross-examined further by counsel for the petitioner, the witness Starling admitted that his own visual observation of the growing marihuana from a point on the street or sidewalk adjacent to petitioner's premises had not sufficed to cause him to go in and take the plant. He said, "Well, I felt like it was marihuana but I wanted to have a chemist to examine it to be able to so state that in the affidavit and also to verify the fact that it is marihuana, if it actually is." Whether the police officer informant who had actually entered the premises and obtained the growing marihuana plant had first observed the same from a vantage point which enabled him to recognize it as such remained unanswered in the testimony. Although Starling testified that he did not consider this police officer to be a confidential informer, when asked the name of the officer he simply replied that he was a special agent of the State Bureau of Investigation, and petitioner's counsel did not follow up and press for the officer's name.

A county deputy sheriff, Lester W. Kelly, was then examined on vior dire as to the physical layout of petitioner's premises. He described the apartment as a duplex and stated that there was no partition dividing the back yard between the two apartments nor any fence around the back yard. He located the garden in which the growing marihuana was found as being immediately to the rear of petitioner's apartment. He estimated its distance from each of the two adjacent streets as from forty to fifty feet.

The petitioner himself then took the stand for voir dire examination, and while his testimony as to the location of the apartment and surrounding area differed somewhat from that of the two preceding witnesses, it is not perceived that his testimony was particularly helpful to either side. He did state that he was not aware prior to his arrest that anyone had entered his garden and seized the growing marihuana plants. The State does not contend that this search and seizure were consented to by petitioner.

On the basis of the evidence thus adduced the presiding judge ruled the search warrant was valid, and the trial proceeded resulting in petitioner's conviction.

On his appeal to the North Carolina Court of Appeals petitioner, who by then was represented by new counsel, urged as grounds for reversal that probable cause for the issuance of the search warrant had been established by information illegally obtained.[3] The difficulty with petitioner's position in this respect was simply that there was no evidence offered at the trial which impelled a finding either way as to whether the initial entry on petitioner's premises for the purpose of seizing the growing marihuana plants constituted an illegal search and seizure. The North Carolina statute prescribing the requisites for search warrants in effect at the time of the issuance of the warrant in this case, G.S. 15-25.1, provided in part as follows:

> "A warrant shall issue only *on affidavit* sworn to . . . , *establishing the grounds* for issuing the warrant." (Emphasis added.)

In view of the absence of any evidence supporting petitioner's argument on the principal point pressed in the North Carolina Court of Appeals that court quite understandably confined its consideration of the appeal to the question of whether the search warrant satisfied the requirements of the quoted provisions of the North Carolina statute. This court is in complete agreement with the conclusion reached that on the face of it the affidavit supporting the issuance of the search warrant satisfied the provisions of the statute and was constitutionally adequate. The statement of the affiant that he observed marihuana plants growing in defendant's back yard, if true, alone justified a finding of probable cause to issue the search warrant. But the statement of the affiant that he observed the marihuana growing on July 12, 1968, was by his own admission on the voir dire examination not true. This gives rise to

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3. A copy of the brief filed on behalf of petitioner in the North Carolina Court of Appeals states the principal question for determination as follows:

> "1. Where probable cause for the issuance of a search warrant is established through the use of information illegally acquired, is evidence obtained in the course of a search pursuant to the warrant admissible in evidence?"

a question which, so far as this court has been able to ascertain, has not heretofore been presented by petitioner to any court. It may be stated thus:

> Where admittedly erroneous information is set forth in a search warrant affidavit the other averments of which standing alone do not suffice to sustain the warrant, may the deficiency be supplied and the warrant nevertheless validated by proof of non-sworn information brought to the attention of the issuing officer and not incorporated in the affidavit?

On the facts of this case the court has concluded that this question must be answered in the negative.

Ordinarily a threshold inquiry at this point would involve consideration of whether the court can go behind the factual basis stated in the search warrant affidavit to discover if the facts stated were true. The majority rule in the state courts seems to preclude impeachment of the factual averments in the affidavit. 79 C.J.S. Searches and Seizures § 86, p. 908.[4] The law in North Carolina is unclear on this point, and it may very well be that the North Carolina Court of Appeals, considering itself bound by the majority rule, declined to consider the testimony of the witness Starling which was at variance with the statements sworn to by him in the affidavit. The question seems to remain undecided by the Supreme Court, *Rugendorf v. United States*, 376 U.S. 528 (1964), but where, as here, a voir dire examination has routinely been conducted in accordance with state procedure and the disclosure of error has been voluntarily made, the federal courts have not hesitated to rule out the erroneous averments in the affidavit and proceed to test the validity of the warrant in the light of the remaining uncontested averments. And where these remaining averments have not been sufficient to sustain the warrant, the motion of the defendant to suppress the evidence obtained through execution of the warrant has been granted. *United States v. Upshaw*, 448 F. 2d 1218 (5th Cir. 1971); *King v. United States*, 282 F. 2d 398 (4th Cir. 1960).

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4. The question has been the subject of considerable legal writing. See articles in 67 Columbia L.R. 1529; 84 Harvard L.R. 825; 53 California L.R. 840.

Stripped of the admittedly erroneous statement in Starling's affidavit to the effect that he examined the yard area immediately behind petitioner's premises on July 12, 1968 and there found "growing suspected marihuana plants", the remaining averments in the affidavit in this case do not support its validation under Fourth Amendment principles enunciated by the Supreme Court. The statement in the opening paragraph of the affidavit that affiant "has reliable information and reasonable cause to believe that John Paul Wren (sic) has on his premises narcotic drugs, to wit: MARIHUANA," being the mere statement of the affiant's belief, is not adequate. *Nathanson v. United States*, 290 U.S. 41 (1933). The statement that affiant "has received information from a person known to the affiant as truthful and reliable that John Paul Wren (sic) has had illegally held marihuana in his possession on two occasions during the period between July 1st, 1968 and July 14, 1968" afforded no grounds for the magistrate to conclude that marihuana would be found on petitioner's premises or in his automobiles on July 15, 1968. *Aguilar v. Texas*, 378 U.S. 108 (1964). See also *State v. Campbell*, 14 N.C. App. 493, _____ S.E. 2d _____ (1972). And the remaining pertinent statement in the affidavit, "That portions of one of the suspected marihuana plants were recovered . . . ", when considered separately from the statement in the immediately preceding sentence, as it must be in view of the admitted error in that statement, fails to inform as to when, where and by whom the suspected plants were recovered. Obviously, such a statement cannot support the issuance of a search warrant. *State v. Campbell*, supra.

And thus we come to the question of whether the warrant can be sustained by reason of the additional information furnished the magistrate by Starling and not incorporated in the affidavit.[5]

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5. Parenthetically, it is observed that when the untrue statement is eliminated from the affidavit it no longer complies with the requirement of the North Carolina law as it existed in 1968. It required, as does Federal Criminal Procedure Rule 41, that the grounds for the issuance of the warrant should be stated therein. *State v. Milton*, 7 N.C. App. 425, 173 S.E. 2d 60 (1970). The North Carolina statute has now been rewritten to require only that the affidavit indicate the basis for the finding of probable cause. G.S. 15-26(b).

Directly in point here is the case of *Frazier v. Roberts*, 441 F. 2d 1224 (8th Cir. 1971). In that case the petitioner in a federal habeas corpus proceeding had been found guilty of possessing burglary tools and gambling equipment in violation of a state statute. The admissibility of the crucial evidence against the petitioner depended entirely on the validity of a search warrant which had been issued on the basis of a concededly deficient affidavit supplemented by unsworn oral information given by the requesting officers. In reversing the district court's denial of the writ of habeas corpus the Eighth Circuit in a unanimous per curiam decision said:

> "It is clear that the Fourth Amendment permits the warrant-issuing magistrate to consider sworn oral testimony supplementing a duly executed affidavit to determine whether there is probable cause upon which to issue a search warrant. *United States v. Berkus*, 428 F. 2d 1148 (8th Cir. 1970). In this case, such additional testimony is crucial to the validity of the warrant because the affidavit alone contained no objective facts whatsoever.
>
> "The Fourth Amendment to the United States Constitution reads:
>
> > 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, *supported by Oath or affirmation*, and particularly describing the place to be searched, and the persons or things to be seized.' (Emphasis added)
>
> "It is certain from the text that the intention was to condition the issuance of warrants upon two requirements: (1) that there be a showing of 'probable cause, supported by Oath or affirmation,' and (2) that 'the place to be searched, and the persons or things to be seized' be described on the face of the warrant with particularity. Thus the Supreme Court has held that a magistrate may find probable cause only 'from facts or circumstances presented to him under oath

or affirmation.' *Nathanson v. United States*, 290 U.S. 41 at 47, 54 S.Ct. 11, 13, 78 L.Ed. 159 (1933). Lower federal cases on the point are rare, since most searches in federal criminal cases are conducted under rule 41 of the Federal Rules of Criminal Procedure. The nearly unanimous view is that the Fourth Amendment requires that only information related to the magistrate on Oath or affirmation is competent upon which to base a finding of probable cause; that unsworn oral statements may not form a basis for that decision. *Lopez v. United States*, 370 F. 2d 8 (5th Cir. 1966); *United States v. Wroblewski*, 105 F. 2d 444 (7th Cir. 1939); *Sparks v. United States*, 90 F. 2d 61, 64 (6th Cir. 1937); *United States ex rel. Boyance v. Myers*, 270 F.Supp. 734, 738 (E.D.Pa. 1967) rev'd on other grds., 372 F. 2d 111 (3rd Cir. 1967)." (Footnotes omitted.)

Applying this law to the present case it follows that while the affiant gave the magistrate additional information which, had it been incorporated in the affidavit, might possibly have served to sustain it,[6] there is no indication that this information was given under oath as required by the Fourth Amendment, and therefore it cannot be used to supplement and validate the search warrant. *United States v. Nelson*. 459 F. 2d 884, 889 (6th Cir. 1972).

It is a matter of concern to this court that the failure of the search warrant in this case to comport with constitutional standards must result in voidance of the conviction of one so obviously guilty as was the petitioner in this case. This is particularly true in a case where the investigative work leading to petitioner's apprehension was performed by the State Bureau of Investigation which is striving so valiantly to cope with the mounting drug problem in this state. Additionally, it is most distasteful for this court to find itself seemingly in disagreement with the exceptionally able judges of our state courts. As previously suggested, however,

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6. *See U. S. v. Ventresca*, 380 U.S. 102, 111 (1965). "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."

this variance in views is more apparent than real. There is nothing to indicate that the points raised herein were ever presented to or considered by any North Carolina court, and it is simply too much to expect the judges of those already overworked courts to pore through voluminous records on the off chance that competent counsel have overlooked something.[7] But where the conviction has not been in accord with constitutional requirements as this court understands them to be, it has no choice in the matter.

Accordingly, it is now

O R D E R E D

That the writ of habeas corpus is allowed: the conviction and judgment are set aside; the respondent is directed to re-try the petitioner within a reasonable time or release him outright, and to notify this court on or before October 15, 1972, what course will be followed. Meanwhile, the appearance bond previously given by petitioner is continued in full force and effect.

The Clerk is directed to transmit by mail copies of this order to counsel for the petitioner and to the Attorney General of North Carolina.

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7. Petitioner has not applied for post conviction relief under the North Carolina statutes and consideration has been given to the exhaustion question which this might pose - another question not raised by respondent - but in view of the relatively short sentence imposed (one year imprisonment), it has been concluded that for the relief to which he is entitled to be effective, it should be awarded now in this court.

> "The inadvertent failure to raise a constitutional claim at the appropriate juncture or to lay the proper evidentiary foundation for the presentation of such a claim, regardless of its effect as a waiver of later litigation or review in the State system, will not preclude inquiry into that claim in a federal habeas corpus proceeding." *Frazier v. Roberts*, 441 F. 2d 1224, 1230 (6th Cir. 1971).

/s/ F. T. Dupree, Jr.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

August 10, 1972.

A True Copy, Teste:
Samuel A. Howard, Clerk

By /s/ Ann Godwin
Deputy Clerk

APPENDIX C

SEARCH WARRANT – NARCOTIC DRUGS POSSESSED IN VIOLATION OF LAW

STATE OF NORTH CAROLINA
WAKE COUNTY V.
John Paul Wren, (sic)
Knightdale, N.C.

IN THE _____ COURT
AFFIDAVIT TO OBTAIN SEARCH WARRANT

HAYWOOD R. STARLING, Special Agent North Carolina State Bureau Investigation, being duly sworn and examined under oath, says under oath that he has reliable information and reasonable cause to believe that JOHN PAUL WREN (sic) has on his premises narcotic drugs, to wit: MARIHUANA, in violation of the North Carolina law. These illegally possessed narcotic drugs are located on the premises and on the person of said JOHN PAUL WREN (sic) as follows:

In an apartment presently occupied by said JOHN PAUL WREN (sic) and one DOROTHY WREN (sic) located in the town of Knightdale, N.C., at the corner of 2nd. & Maple Streets, known as Apartment "B", apartment "B" being one of two apartments located in a two story dwelling, said dwelling being of asbestos siding, said apartment "B" being further described as located on the west side of the dwelling,

In a yard directly behind the above described dwelling. In a blue Chevrolet auto, lic. N.Y.68# 8T-1392 & a grey Cadilac (sic) (1962) displaying N.C. 68 license D H 8 2 11. That the facts which establish reasonable grounds for issuance of a search warrant are as follows:

The Affiant is a Special Agent of the N.C. State Bureau Investigation which Agency is charged with the investigation and enforcement of the narcotic laws. Further, that the Affiant has received information from a person known to the Affiant as truthful and reliable that John Paul Wren (sic) has had illegally heldimarihuana in his possession on two occasions during the period between July 1st, 1968 and July 14, 1968. That the Affiant made subsequent investigation which revealed the following:

That said John Paul Wren (sic) presently resides with one Dorothy Wren (sic) at and in a single unit of a duplex white asbestos apartment located at the corner of 2nd and maple (sic) Streets, Knightdale, N. C. and is further described as located on the west side and known as apartment "B", that John Paul Wren (sic) and Dorothy Wren (sic) live together as man and wife.

That on July 12, 1968 the Affiant examined the yard area located immediately behind the above described apartment and there found a quanity (sic) of growing suspected marihuana plants. That portions of one of the suspected marihuana plants were recovered, delivered to W. S. Best Chemist of the State Bureau Investigation Chemical Laboratory in Raleigh, NC that subsequently said Chemist Best advised the Affiant that the suspected marihuana was and is marihuana. That the Affiant has personal knowledge of said W. S. Best having previously qualified and testified as an expert in the identification of marihuana in the courts of North Carolina.

That the NC Department of Motor Vehicles files presently list as registered to John Paul Wren (sic), 2nd and Maple Streets, Knightdale, N. C. the following described vehicle:

A 1962 model 4 door Cadilac (sic), N. C. 1968 license tag # DH 8211.

Further, that said investigation has established that between July 1st 1968 and July 14th 1968 said John Paul Wren has possessed, driven and otherwise used a Chevrolet automobile, late model-exact year model unknown to Affiant, displaying a N.Y. 1968 license tag # 8T-1392, color bright blue, containing slight damage to the left rear panel including a portion of the chrome strip missing.

/s/ Haywood R. Starling
AFFIANT

Subscribed and sworn to before me
this 15 day of July 1968.

/s/ Brooks W. Poole
Name of Warrant issuing official

Justice of the Peace
Title of warrant issuing official

PLAINTIFF'S
EXHIBIT
2

APPENDIX D

RELEVANT EXCERPTS FROM THE TRIAL VOIR DIRE ON THE MOTION TO SUPPRESS THE SEIZED EVIDENCE

Starling's date references during the *voir dire* to the point of correction were as follows:

(TR p 20)

Q. Then, sir, the date that you first got information about Mr. John Paul Wrenn was when?

A It was on or about the 13th of July, 1968.

Q. All right, sir, had you been to the premises or in sight of the premises for this investigation prior to that date?

A I had not.

Q All right, sir, did you go to the premises on July the 13th?

A Yes, sir.

(TR p 21)

Q And when was the next time that you went back there?

A The following day.

(TR p 22)

Q All right, sir. Now, was that the same informer that was there with you on the 13th?

A The same that gave it to me?

Q Yes, sir.

A Yes, sir.

(TR p 23)

Q When did he give it to you?

A I do not recall. It was prior to–it was either on or about the 13th of July.

Q Well did he give it to you before or after you first went near the premises with him?

A Well he gave it before I went to the premises.

(TR p 23)

Q All right, sir. Now, had you talked to this informer about these premises prior to the 13th?

A Yes, I had.

Q You had?

A Yes, sir.

Q Prior to the 13th?

A Well actually I had two informants in the matter. Both gave me information on it. So I had talked to another informant.

(TR p 24)

Q Then your affidavit you put then that on July the 12th, 1968, the affiant - that is you - examined the yard area located immediately behind the above described apartment, is that correct?

A Well I would say then my testimony a moment ago was incorrect as to the date. It has been two and a half years ago.